FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN,
AN UNINCORPORATED ASSOCIATION,
Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,
Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,
Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLEES IN REPLY TO APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

ERNEST S. BALLARD,
WILLIAM F. PRICE,
WALTER I. DEFFENBAUGH,
120 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Plaintiffs-Appellees.

POPE & BALLARD,
120 South La Salle Street,
Chicago 3, Illinois,
Of Counsel.

February 14, 1947.

THE DUNHORP WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

TABLE OF CONTENTS.

	PAGE
I. Replying to appellant's criticism of plaintiffs' statement of the case	2
II. Replying to appellant's contention that as an indispensable party it has an absolute right to intervene	3
III. Replying to appellant's contention that a federal statute gives it an unconditional right to intervene	8
IV. Replying to appellant's contention that it is entitled to intervene as of right under Rule 24 (a) (2) of the Rules of Civil Procedure	10
Conclusion	11

TABLE OF CASES CITED.

International Brotherhood v. Keystone Freight Lines, 123 F. (2d) 326	4
Texas & P. Ry. Co. Operation, 247 I. C. C. 285	7
U. S. v. California Canneries, 279 U. S. 553	5

OTHER CITATIONS.

House Report No. 2832, 76th Cong., 3rd Sess.	9
Interstate Commerce Act—	
Section 5 (2) (f) (49 U. S. C. A., Sec. 5 (2) (f))	5
Section 17 (11) of Part I (49 U. S. C. A., Sec. 17 (11); 24 Stat. L. 379; 25 Stat. L. 861; 40 Stat. L. 270; 41 Stat. L. 492; 47 Stat. L. 1368; 54 Stat. L. 898	8, 9
Judicial Code, 28 U. S. C. A. Sec. 45a	9
Rule 24 (a) (2) of Rules of Civil Procedure	10
Transportation Act of 1940	9

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 970.

BROTHERHOOD OF RAILROAD TRAINMEN,
AN UNINCORPORATED ASSOCIATION,
Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,
Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,
Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLEES IN REPLY TO APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Plaintiffs-Appellees (hereinafter referred to as plaintiffs) for the purpose of clarity, desire to make a short reply to some matters contained in appellant's brief in opposition to plaintiffs' motion to dismiss or affirm.

I.

Replying to Appellant's Criticism of Plaintiffs' Statement of the Case.

Appellant contends (Brief, p. 3) that plaintiffs are in error in stating that the Commission's order of May 16, 1922, enforcement of which is sought by plaintiffs, antedated the alleged contract between The Chicago River and Indiana Railroad Company (hereinafter referred to as the River Road) and the appellant as representative of its trainmen. Appellant states "The contract was signed December 20, 1919, as shown by the copy of it in the record (Tr. 174)". The reference is to page 14 of the printed pamphlet attached as Exhibit A to the affidavit of Felix E. Kazmer, which affidavit was filed in support of the pleadings accompanying appellant's motion to intervene (R. 154-159). The date of this pamphlet is not shown, but inasmuch as page 2 thereof refers to rates of pay effective October 1, 1937, it is apparent the pamphlet could not long have antedated and probably postdated October 1, 1937. Page 1 of the pamphlet lists the railroads who were parties to the agreement with the appellant set forth therein. The River Road is not listed as a party and obviously it was not a party when the pamphlet was issued.

This pamphlet conclusively disposes of appellant's assertion that its contract with the River Road on behalf of the latter's trainmen, on which it relies, antedated the Commission's order. The affidavit, dated May 11, 1946, to which the pamphlet is attached recites that it embodies the agreement between the plaintiffs and the River Road, which "has been in effect for several years last past" (R. 155). As pointed out in plaintiffs' statement of the case, which appellant criticizes as inaccurate, the allegation as to when the contract between the appellant and the River Road be-

came effective, contained in the motion to intervene, is that it "has been in effect for several years last past" (R. 136).

The court below made it perfectly plain that in its opinion an order of the Commission could not be affected or modified by a later contract between the River Road and the appellant (Appellant's brief, pages 13-14), yet at no time did the appellant claim in the court below that its alleged contract antedated the order of the Commission. As above shown the record conclusively demonstrates the contrary.

Appellant's criticism (Brief, p. 3) of plaintiffs' statement relative to the Commission's reference to the practice of plaintiffs of moving their cars into and out of the Union Stock Yards over the line of the River Road is unwarranted. There is no question but that plaintiffs did use their own power and crews in making such movements. Neither appellant's motion to intervene nor its pleadings accompanying the motion challenge the fact that the practice was for plaintiffs to move said cars with their own power and crews. As a matter of fact, appellant's motion to intervene admits that this was the practice (R. 136-137). Such was the practice to which the Commission referred and which by condition 3 of the order it directed should be continued.

II.

Replying to Appellant's Contention That as an Indispensable Party It Has an Absolute Right to Intervene.

Appellant (Brief, p. 9) cites authority to the effect that "no court can adjudicate directly upon a person's right without the party being actually or constructively before the Court." Plaintiffs have no quarrel with this statement of the law. A judgment or decree purporting to bind a person not a party or in privity with a party be-

fore the court is a nullity and he need not concern himself with it as he will not be bound. If appellant is an indispensable party, it can ignore the entire proceeding since it will not be bound by any decree therein.

The case of *International Brotherhood* v. *Keystone Freight Lines,* 123 F. (2d) 326, relied on by appellant (Brief, p. 10), has no application to this suit. In that case the plaintiff, a motor carrier, was engaged in a labor dispute with its own employees who were on strike. Connecting motor carriers who customarily interchanged freight with plaintiff were refusing to do so for the reason that their employees, who were members of the union that had called the strike against plaintiff, refused to handle such freight. Plaintiff sued to compel the connecting motor carriers, the union and its members who were their employees to interchange freight with it. The union was denied leave to intervene by the court below. On appeal it was held that the case was moot, but the Court of Appeals said in a *dictum* that the intervention should have been allowed below.

In that case the court's position that the union was the real party in interest is readily understandable. Primarily plaintiff's controversy was with its striking employees, represented by the union, and the purpose of plaintiff's suit was to defeat the strike by compelling the employees of the connecting carriers, also members of the union, to interchange freight with the plaintiff.

Here, however, there is no controversy between plaintiffs and their employees or the employees of the River Road. The only issue is whether the River Road itself shall continue to obey the order of the Commission, as it has been doing for 26 years, or shall now for the first time violate it. So far as plaintiffs and the Commission are concerned, appellant is an utter stranger to that controversy. Neither plaintiffs nor the Commission have any

control over or are in any way concerned with the relations, contractual or otherwise, existing between the employees represented by appellant and the River Road. So far as plaintiffs and the Commission are concerned the real parties defendant are the carriers who have violated the order of the Commission, which both the plaintiffs and the Commission are entitled to have enforced. No rights of the employees represented by the appellant will be adjudicated.

The most that a decree in this suit could do would be to prevent the River Road from specifically performing its alleged contract with appellant. But appellant has cited no authority for the proposition that, if A sues to enforce an obligation of B to A, parties holding subsequent contracts with B, the performance of which by B might be impaired by a judgment in favor of A, have any right to intervene in such an action. If such a principle were admitted, the utmost confusion would result from the intervention of parties whose alleged interest might lie in having B found free from the asserted obligation. The case of *U. S. v. California Canneries*, 279 U. S. 553, 556, cited in plaintiffs' statement in opposition to the jurisdiction of this Court and not referred to by appellant in its brief, is directly in point here. It holds that such parties have no right to intervene.

Section 5 (2) (f) of the Interstate Commerce Act (49 U. S. C. A., Sec. 5 (2) (f)), referred to by appellant (Brief, p. 11), can have no application to this case. That section, which was added to the Act in 1940, some eighteen years after the Commission's order here involved, provides as follows:

> "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the rail-

road employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

It is inconceivable that Congress by this provision intended to permit carriers to nullify, through the medium of collective bargaining agreements, conditions attached to prior orders of the Commission, and a brief examination of the purpose of this section shows that it has no such effect. It directs the Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected" when approving a merger, consolidation, lease, etc. This protection is to assure such employees that for a maximum period of four years they will not be in a worse position with respect to their employment than before. But such a provision in a Commission order, unless qualified, would be an invasion of the field normally covered by collective bargaining agreements between the carriers and the authorized representatives of their employees. The last sentence of the paragraph was therefore necessary to forestall the argument that, once the Commission had acted, there was no room for collec-

tive bargaining. The Commission has so applied the section. In prescribing conditions under this paragraph, it has left certain matters to be settled through collective bargaining negotiations. *Texas & P. Ry. Co. Operation*, 247 I. C. C. 285, 296-297.

But, in any event, the language of the last sentence of the paragraph makes it inapplicable to the instant case. The term "said employees" refers to those employees adversely affected in their employment status by action taken under a Commission order entered pursuant to Section 5 (2). Neither the employees of the River Road nor of the Central were affected, adversely or otherwise, by the imposition of condition 3 of the Commission's order. In fact, as pointed out in plaintiffs' statement in opposition to the jurisdiction of this Court, the effect of that condition was to preserve the *status quo* of these employees, as well as that of the employees of the trunk line carriers connecting with the River Road. Clearly therefore Section 5 (2) has no bearing here.

Appellant suggests (Brief, pp. 11-12) that the order of the Commission need not be construed to require the River Road to permit plaintiffs to use their own crews in the operation of their trains here involved and that the Commission's report does not state that empty cars of the plaintiffs "are moved to points of loading" by the plaintiffs. It is contended in effect, therefore, that the order of the Commission needs interpretation and construction and that appellant is entitled to be heard in that connection.

We assert in the first place that appellant's suggestion is frivolous. Whatever the Commission may have said in its report, it ordered the continuation of the practice as it theretofore existed and there never was and cannot now be any doubt as to what that practice consisted of.

In the second place appellant's suggestion comes too late. No such claim was advanced by it in its motion to intervene, or in the accompanying pleadings. On the contrary the motion admitted the existence of the practice. And both the complaint and the intervening complaint also alleged its existence.

We therefore submit that the Court need not concern itself with appellant's suggestion that it is entitled to be heard on the question of interpretation. The suggestion is utterly frivolous and is foreclosed by appellant's position below. And in addition it presupposes an interest entitling appellant to intervene, the very point appellant is attempting to establish.

III.

Replying to Appellant's Contention That a Federal Statute Gives It an Unconditional Right to Intervene.

Appellant insists that Section 17 (11) of Part 1 of the Interstate Commerce Act (49 U.S.C.A., Sec. 17 (11)) confers upon it an unconditional right to intervene, and that this section relates not only to proceedings before the Commission but to suits brought pursuant to the Act. Section 17 (11) provides:

> "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees."

As originally enacted in 1887, Section 17 (24 Stat. L. 379 at page 385) related only to procedure before the Commission. It has been amended from time to time (25 Stat. L. 861 (1889); 40 Stat. L. 270 (1917); 41 Stat. L. 492 (1920); 47 Stat. L. 1368 (1933)) but, throughout these amendments, it has related exclusively to procedure before the Commission. The last amendment occurred in

1940 (54 Stat. L. 898 *et seq.*) and included, among other changes, the provision above quoted. The Transportation Act of 1940, which carried this amendment, was a long measure making many amendments to the Interstate Commerce Act as a whole, but the subtitle, which preceded the amendments of Section 17, read:

> "Commission procedure; delegation of duties; rehearings" (54 Stat. L. 898 at page 916).

Thus the subtitle of the amendatory act itself limits the scope of Section 17 (11) to proceedings before the Commission. Although it seems unnecessary, we may call attention to the reference to this amendment of Section 17 which is contained in H. R. Report No. 2832, 76th Congress, 3d session, which was a conference report on the Transportation Act of 1940. Discussing the action of the conference, it is said at page 72:

> "Section 13 of the House amendment rewrote section 17 of the Interstate Commerce Act *which deals with the administrative disposition of matters coming within the Commission's jurisdiction.* The revision included matter in sections 204 (e) and 205 (a) which contained provisions dealing with procedural matters under part II of the Interstate Commerce Act relating to motor-carrier proceedings. Such sections 204 (e) and 205 (a) were repealed. Among other things the revised section 17 provided for the assignment of work or functions to an individual commissioner, an examiner, or Board of examiners." (Emphasis ours.)

There is, therefore, no warrant for lifting paragraph (11) out of its context and claiming that it relates to suits in court as well as to proceedings before the Commission.

Appellant appears to admit that 28 U. S. C. A. Section 45a, which it originally relied on, does not confer upon it an unconditional right to intervene.

IV.

Replying to Appellant's Contention That It Is Entitled to Intervene as of Right Under Rule 24 (a) (2) of the Rules of Civil Procedure.

Section 24 (a) (2) provides that upon timely application anyone shall be permitted to intervene in any action "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

As pointed out in plaintiffs' statement in opposition to the jurisdiction of this Court (pp. 14-15), this rule represents a codification of the general doctrines of intervention and presupposes a direct interest in the controversy. Before the question can arise as to whether an applicant's interest is adequately represented by existing parties, he must show such an interest in the suit as under the general doctrines of intervention would entitle him to intervene. If he shows such interest, and then shows that such interest may be inadequately represented and that he may be bound by the judgment, he is entitled to intervene. Since the appellant has shown no such interest in this suit as would entitle it to intervene under the general doctrines of intervention, the question of the adequacy of the representation of its interest does not arise. Furthermore, as previously pointed out, no rights of appellant will be adjudicated in this controversy.

Conclusion.

For the reasons pointed out in plaintiffs' statement in opposition to the jurisdiction of this Court, and for the reasons herein shown, this Court should refuse to entertain the appeal.

Respectfully submitted,

ERNEST S. BALLARD,
WILLIAM F. PRICE,
WALTER I. DEFFENBAUGH,
120 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Plaintiffs-Appellees.

POPE & BALLARD,
120 South La Salle Street,
Chicago 3, Illinois,
Of Counsel.

February 14, 1947.